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Allianz General Insurance Malaysia v KL Chan & Assoc

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-72–01 OF 2015
ROHANA YUSUF, PRASAD ABRAHAM AND MARY LIM JJCA
28 MARCH 2017

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Insurance — Policy of insurance — Claim under — Respondent entered into contract of insurance with appellant under master policy — Respondent sued by third party for negligence — Policy repudiated by appellant — Respondent claimed against appellant for indemnity — Whether respondent breached policy by withholding information on potential claim against respondent — Whether there was breach of terms of policy when respondent entered into settlement agreement with third party

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The respondent had entered into a contract of insurance with the appellant under a master policy ('the policy') which covered the period from 1 January 2001–31 December 2001. It was a term of the policy that the respondent would be indemnified against any liability for losses arising from any claim for compensation including costs made against him, for any negligence in the performance of his duties as an engineer. Subsequently, the respondent was sued by Aneka Seloka Sdn Bhd under the tort of negligence, for breach of professional services in relation to a housing project in Ipoh. The respondent forwarded the writ and statement of claim to the appellant and the appellant's solicitors responded by informing the respondent to engage its own solicitors. The appellant had also repudiated the policy on the basis that the respondent had breached cl 2.02(2) of the policy ie failure of the respondent to disclose material facts. Settlement agreement was later entered between the respondent and Aneka Seloka Sdn Bhd in which the respondent was obligated to pay the sum of RM703,000 to Aneka Seloka Sdn Bhd. The respondent's claim against the appellant in the High Court was for the appellant to reimburse the amount paid out by the respondent ie the sum of RM703,000 under the settlement agreement and all the legal fees and geotechnical expert fees incurred by the respondent. The learned High Court judge found that the appellant had wrongfully repudiated the policy and consequently, the learned judge allowed the respondent's claim. Aggrieved by the decision, the appellant filed the present appeal. The appellant submitted that: (a) the respondent had breached cl 2.02(2) of the policy by withholding information on the potential claim against him by Aneka Seloka Sdn Bhd when he failed to disclose such information in the proposal form dated 23 February 2001; and (b) the learned High Court judge erred in finding that there was no breach of the terms of the policy when the settlement agreement was entered into by the respondent.

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Held, allowing the appellant's appeal with costs and setting aside the decision of the learned High Court judge:

(1) The learned judge had erred and misdirected herself in finding that there was no evidence adduced by the respondent of any claim made prior to February 2001. Firstly, the learned judge totally missed the whole requirement of cl 2.02(2) of the policy in relation to the need to disclose information on a potential claim. It was clear under cl 2.02(2) that the disclosure had to be made once there was such intimation or circumstances which may give rise to claim. Secondly, the learned judge did not consider the evidence and admission of the respondent (PW1) that he was aware of the potential claim and had further admitted that he had failed to disclose the same. On these admissions alone the learned judge could have easily found a breach of the policy by the respondent which entitled the appellant to rely on cl 2.02(2) to repudiate the policy (see paras 21–23 & 25).

(2) The letter from the appellant's solicitors, which requested the respondent to defend themselves, was made pending the appellant perusing through on the aspect of its liability. It could not be taken or construed as implied consent to a settlement from its plain reading. Further, cl 1.02 of the policy required written consent of the appellant to enter into any settlement of a claim and cl 3.02 of the policy prohibited any admission of liability on the part of the insured to settle any claim or incur any costs or expenses in relation to a claim without written consent from the appellant as the insurer. In totality, the decision of the learned trial judge was a plainly wrong decision that called for appellate intervention (see paras 33–34).

[Bahasa Malaysia summary

Responden memasuki kontrak insurans dengan perayu di bawah polisi utama ('polisi') yang melitupi tempoh dari 1 Januari 2001–31 Disember 2001. Ia adalah terma polisi bahawa responden akan dibayar ganti rugi terhadap apa-apa liabiliti bagi kerugian berbangkit daripada apa-apa tuntutan untuk pampasan termasuk kos yang dibuat terhadapnya, bagi apa-apa kecuaian di dalam melaksanakan tugasnya sebagai jurutera. Kemudiannya, responden disaman oleh Aneka Seloka Sdn Bhd di bawah tort kecuaian, kerana melanggar perkhidmatan profesional berkaitan projek perumahan di Ipoh. Responden menyerahkan writ dan pernyataan tuntutan kepada perayu dan peguamcara perayu menjawab dengan memberitahu responden untuk mendapatkan khidmat peguamnya sendiri. Perayu juga telah menolak polisi tersebut atas asas bahawa responden telah melanggar klausa 2.02(2) polisi iaitu kegagalan responden untuk mendedahkan fakta material. Perjanjian penyelesaian kemudiannya dimasuki di antara responden dan Aneka Seloka Sdn Bhd di mana responden bertanggungjawab untuk membayar sejumlah RM703,000 kepada Aneka Seloka Sdn Bhd. Tuntutan responden terhadap perayu di

Mahkamah Tinggi adalah untuk perayu membayar balik jumlah yang dibayar oleh responden iaitu RM703,000 di bawah perjanjian penyelesaian dan kesemua fi guaman dan fi pakar geoteknik yang ditanggung oleh responden. Hakim Mahkamah Tinggi mendapati bahawa perayu telah secara salah menolak polisi tersebut dan akibatnya, hakim bijaksana membenarkan tuntutan responden. Tidak puas hati dengan keputusan tersebut, perayu memfailkan rayuan ini. Perayu berhujah bahawa: (a) responden telah melanggar klausa 2.02(2) polisi dengan tindakan menyekat maklumat atas tuntutan yang berpotensi terhadapnya oleh Aneka Seloka Sdn Bhd apabila dia gagal untuk mendedahkan maklumat di dalam borang cadangan bertarikh 23 Februari 2001; dan (b) hakim Mahkamah Tinggi yang bijaksana tersilap dalam dapatan bahawa tidak terdapat pelanggaran kepada terma-terma polisi apabila perjanjian penyelesaian dimasuki oleh responden.

Diputuskan, membenarkan rayuan perayu dengan kos dan mengenepikan keputusan hakim Mahkamah Tinggi:

(1) Hakim bijaksana telah tersilap dan salah arah dalam dapatan bahawa tidak terdapat keterangan yang dikemukakan oleh responden terhadap apa-apa tuntutan yang dibuat sebelum Februari 2001. Pertama, hakim bijaksana secara keseluruhan tertinggal kehendak sepenuhnya klausa 2.02(2) polisi berkaitan kepada perlunya untuk mendedahkan maklumat atas tuntutan yang berpotensi. Ia adalah jelas di bawah klausa 2.02(2) bahawa pendedahan perlu dibuat sebaik sahaja terdapat tanda-tanda atau keadaan yang mungkin membangkitkan kepada tuntutan. Kedua, hakim bijaksana tidak mempertimbangkan keterangan dan pengakuan responden (PW1) bahawa dia sedar mengenai tuntutan yang berpotensi tersebut dan telah mengaku selanjutnya yang dia gagal untuk mendedahkannya. Atas pengakuan ini sahaja hakim bijaksana boleh dengan senang mendapati pelanggaran polisi oleh responden yang memberikan hak kepada perayu untuk bergantung ke atas klausa 2.02(2) untuk menolak polisi tersebut (lihat perenggan 21–23 & 25).

(2) Surat daripada peguamcara perayu, yang meminta responden untuk membela diri mereka, dibuat sementara menunggu perayu membaca dengan teliti atas aspek liabilitinya. Ia tidak boleh diambil atau ditafsirkan sebagai izin tersirat kepada penyelesaian daripada pembacaan biasanya. Selanjutnya, klausa 1.02 polisi memerlukan izin bertulis perayu untuk memasuki apa-apa penyelesaian tuntutan dan klausa 3.02 polisi melarang apa-apa pengakuan liabiliti bagi pihak pengambil insurans untuk menyelesaikan apa-apa tuntutan atau menanggung apa-apa kos atau perbelanjaan berkaitan tuntutan tanpa izin bertulis daripada perayu sebagai syarikat insurans. Secara keseluruhan, keputusan hakim bicara yang bijaksana adalah keputusan yang jelas salah yang memerlukan campur tangan mahkamah rayuan (lihat perenggan 33–34).]

Notes

For a case on claim under policy of insurance, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 489.

Cases referred to

AXA Affin General Insurance Bhd v ALW Car Workshop Sdn Bhd [2017] 2 MLJ 101; [2017] 2 CLJ 163, CA (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)

Juara Serata Sdn Bhd v Alpharich Sdn Bhd [2015] 6 MLJ 773; [2015] 9 CLJ 37, FC (refd)

Leong Kum Whay v QBE Insurance (M) Sdn Bhd & Ors [2006] 1 MLJ 710; [2006] 1 CLJ 1, CA (refd)

MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd [2016] 2 MLJ 428; [2016] 4 CLJ 665, CA (refd)

Perbadanan Kemajuan Negeri Selangor v Selangor Country Club Sdn Bhd [2017] 2 MLJ 819; [2016] 8 CLJ 211, CA (refd)

Tan Kang Hua v Safety Insurance Co [1973] 1 MLJ 6, FC (refd)

Legislation referred to

Limitation Act 1953

Appeal from: Civil Suit No 22NCC-4–01 of 2013 (High Court, Kuala Lumpur)

Leslie Bala (Paul Ngooi with him) (Othman Hashim & Co) for the appellant.
Awtar Kaur (KL Choy & Co) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

[1] This appeal emanates from the decision of the High Court at Pulau Pinang after a full trial, in relation to a claim made by the respondent pursuant to a professional indemnity insurance policy. Prior to this, on 30 April 2014, the learned High Court judge had decided and ordered for the respondent's claim to be dismissed on the reason that it was barred by limitation pursuant to the Limitation Act 1953. The respondent then appealed against the said decision. It was allowed by this court on 2 October 2014 as it was found that the cause of action by the respondent in fact arose in or around 2011 and thereby, the claim of the respondent was still within time.

[2] The case was remitted back before the same High Court judge to be decided on its merits in particular on the issue of whether the policy was lawfully repudiated. Thereafter, the learned High Court judge found that the policy was unlawfully repudiated and proceeded to allow the claim of the

respondent. The appeal by the appellant before us pertained to that decision.

[3] We have heard the appeal on 9 December 2015 and we have unanimously allowed the appeal of the appellant and set aside the order made by the learned High Court judge. Our reasons for our decision are set out below.

[4] By way of background, the respondent is a firm of consulting engineers known as KL Chan & Assoc. KL Chan & Assoc is a partnership where one of the partners, Chan Kam Leong is a member of the Association of Consulting Engineers. The appellant is an insurance company providing amongst others, professional indemnity insurance to members of the Association of Consulting Engineers. The appellant was then known as Malaysian British Assurance Bhd which was later changed to Allianz General Insurance Bhd.

[5] The respondent entered into a contract of insurance with the appellant under a master policy number 01LMT000099 Certificate Number 000034 ('the policy'). The period covered was from 1 January 2001–31 December 2001. The proposal for the policy was made on 31 October 2000 as evidenced in the proposal form. The certificate of insurance was issued on 23 February 2001. The limit of insurance payable was RM1m. There was a deductible of RM50,000 for each and every claim under the policy.

[6] It is a term of the policy that the respondent as an insured, would be indemnified against any liability for losses arising from any claim for compensation including costs made against him, for any negligence by way of act, error or omission in the performance of his duties as an engineer, during the cover period.

[7] The respondent was engaged as a structural consulting engineer in a housing project ('the project') in Ipoh, which was developed by Aneka Seloka Sdn Bhd. The project was completed in mid-1999 and certificate of fitness was issued by the local authority in September 1999. Structural defects of the houses in the project were first reported by the residents in April 2000 as stated in Dunning Thorthon Consultants (M) Sdn Bhd's report dated May 2002 (at p 432 of the appeal record, Parts B and C, Vol 2(4)). It was in evidence that one the complaint letters sent to the developer about the structural defects on 9 August 2000 was also copied to the respondent. It must be observed that Arup Jururunding Sdn Bhd, the consulting engineers appointed by the developer to investigate the damage to the houses had stated in its July 2001 report that 'The houses were occupied when cracks in the structure were reported in April 2000).' (see p 292 of the appeal record, Part B, Vol 2(3)).

[8] On three respective dates of 1 March 2001, 20 April 2001 and 7 August

2001, the respondent gave official notices purportedly under cl 3 of the policy, of a pending claim against him to the appellant. According to the respondent, the appellant was kept abreast by him of what was happening regarding the said claim.

[9] The respondent was eventually sued by Aneka Seloka Sdn Bhd in a Civil Action No 22–4 of 2003 filed at Ipoh High Court on 11 March 2003 under the tort of negligence, for breach of professional services in relation to the project. The claim was for damages in the sum of RM1,589,984.90. The respondent forwarded the writ of summons and statement of claim to the appellant. Upon receiving the writ the appellant's solicitors, Messrs Othman Hashim & Co had on 28 March 2003 written to the respondent informing the respondent to engage its own solicitors to defend the claim by Aneka Seloka Sdn Bhd.

[10] The respondent proceeded to engage his own solicitors to defend the action and the appellant kept silent while the claim against the respondent was proceeding. The respondent claimed that pursuant to the policy he was entitled to reimbursements for the expenses incurred in engaging his own solicitors to defend the suit by Aneka Seloka Sdn Bhd against him. On 21 May 2004 however, after carrying out some investigations the appellant through its solicitors repudiated liability of the policy (at pp 493–494 of the appeal record, Parts B and C, Vol 2(4)).

[11] Later, on 23 June 2010 the respondent informed the appellant that the claim of Aneka Seloka Sdn Bhd would be amicably resolved between the parties. The appellant also did not respond and remained silent. On 22 February 2011, the respondent and Aneka Seloka Sdn Bhd together with another party entered into a settlement agreement on the Aneka Seloka's suit. The settlement agreement is as found at p 503 of the appeal records (Parts B and C, Vol 2(4)). Pursuant to the settlement agreement the respondent was obligated to pay a sum of RM730,000 to Aneka Seloka Sdn Bhd. This payment of RM730,000 was after a deduction of the respondent's counterclaim of RM21,350.

[12] Further to that, the respondent had incurred costs in the form of legal fees of RM10,218 to Messrs Ooi & Assoc and RM65,950 to Messrs Amin Tan & Co. There were also geotechnical expert fees of RM21,000 to USAINS Holding Sdn Bhd incurred in defending the civil action by Aneka Seloka Sdn Bhd. In all, a total of RM97,168 was incurred by the respondent. The respondent had to further incur legal fees of RM31,300 to KL Choy & Co to take up this legal suit against the appellant. The respondent's claim against the appellant is for the appellant to reimburse the amount paid out by the respondent which the respondent claimed he is entitled to be indemnified pursuant to the terms of the policy.

[13] The basis for the appellant repudiating the policy on 21 April 2004, was because the respondent had breached cl 2.02(2) of the policy. Accordingly the breach was for failure of the respondent to disclose material facts as envisaged by that clause. The material fact being that the respondent already had information of the potential claim by Aneka Seloka Sdn Bhd against him at the point of him entering into the contract of insurance with the appellant.

[14] The respondent then filed this claim before the High Court. The learned High Court judge however allowed the claim of the respondent holding that the appellant had wrongfully repudiated the policy. In her grounds of judgment the learned judge made a finding that there was no claim made against the respondent prior to February 2001 and that the respondent was only indicated of the possibility of claims by the developer sometime in February 2001 while the policy was still effective. As such, the respondent was not withholding any information at the time he entered into the insurance contract with the appellant. There was therefore no breach of the policy as contended, according to the learned judge.

[15] The learned judge further found that there was an implied consent from the appellant for the respondent to enter into the settlement agreement with Aneka Seloka Sdn Bhd on 22 February 2011. Her Ladyship's finding was premised on the appellant's letter of 28 March 2003. In that letter which was made through its solicitors, the respondent was told to defend the case instituted by Aneka Seloka Sdn Bhd against him, himself. On the basis of that letter the learned judge found no breach on the part of the respondent in settling the claim of Aneka Seloka vide the settlement agreement. As such there was no basis for the appellant to repudiate the policy, rendering the repudiation wrongful.

[16] Having found that the policy was wrongfully repudiated, the learned High Court judge then allowed the following items of claim made by the respondent:

(a) judgment for the sum of RM705,350;

(b) the sum of RM81,568 being expenses incurred;

(c) the sum of RM31,300 being expenses on legal suit against the insurance company;

(d) interest at 5%pa from 16 December 2014 till full payment; and

(e) costs of RM35,000.

GROUNDS OF APPEAL

[17] Before us, learned appellant's counsel raised several grounds of appeal listed under the following headings:

(a) the learned judge erred in deciding that the Professional Indemnity Policy No 01LMT00099 vide Certificate No 000034 was unlawfully repudiated by the appellant on 21 May 2004 for non-disclosure of material facts;

(b) the learned judge erred in deciding that there was an implied permission given to the respondent to enter into a settlement agreement on 22 February 2011 for the sum of RM730,000 with the Developer, Aneka Seloka Sdn Bhd; and

(c) the learned judge erred in allowing the respondent's claim for the sum of RM705,350 whilst there is no evidence that such a payment was actually made to the Developer, Aneka Seloka Sdn Bhd.

OUR DECISION

[18] The appellant's right to repudiate any claim is listed out in cl 2.02 of the policy. The relevant cl 2.02 deserves to be quoted to appreciate the full breath of its meaning. Clause 2.02 is part of the exclusion clause of the policy, and it clearly states that:

> 2.02 The Company shall not indemnify the Insured for any claim:
>
> (1) ...
>
> (2) Of which the Insured received any intimation or notice, or of circumstances known to the Insured as may give rise to a claim then before the inception of this Policy.
>
> (3) ...

[19] It was the appellant's case that the respondent had breached cl 2.02(2) by withholding information on the potential claim against him by the developer Aneka Seloka Sdn Bhd when he failed to disclose such information in the proposal form dated 23 February 2001. The appellant contended that by that time, the respondent would have at least become aware of the potential claim when he received a letter of complaint on 9 August 2000, copied to him.

[20] The learned High Court judge had found that there was no claim made against the respondent prior to February 2001 and that the respondent was only aware of the claim when he notified the appellant vide letters of 1 March

2001, 20 April 2001 and 7 August 2001 pursuant to cl 3.0 of the policy. We agreed with learned appellant's counsel that this finding was erroneous both on the facts and on the law.

[21] To recapitulate, the main basis for the learned judge to allow the claim of the respondent was because Her Ladyship found that there was no claim against the respondent prior to February 2003 for the respondent to disclose to the appellant when he signed the proposal form on 31 October 2000. In dealing with the requirement of cl 2.02(2) the learned High Court judge in her grounds of judgment strangely found that there was no notice of any claim made against the respondent 'before the inception date of the policy'. The learned judge held that there was no evidence adduced by the respondent of any claim made prior to February 2001.

[22] We agreed with learned appellant's counsel that in holding so the learned judge had erred and had misdirected herself on both the law and the facts for two main reasons. First the learned trial judge totally missed the whole requirement of cl 2.02(2) in relation to the need to disclose information on a potential claim. Secondly, the learned judge did not consider the evidence and admission of the respondent through the evidence of PW1, who had admitted that he was aware of the potential claim and had further admitted that he had failed to disclose the same.

[23] The requirement to disclose under the policy is not premised on the fact that a claim had been made but merely on the fact that there was an intimation of or notice of circumstances known to the insured as may lead to a potential claim against him. It is clear from its wordings that the disclosure under cl 2.02(2) has to be made once there is such an intimation or circumstances which may give rise to a claim. The construction of this clause can be easily discerned from a plain reading of it. There need not be a claim in place or already been made, before the requirement of disclosure under cl 2.02(2) kicks in. While we may agree with Her Ladyship that there was no claim made then, but that is not the requirement of disclosure under cl 2.02(2). The learned judge had clearly fallen into error in the way she construed the requirement of disclosure under this clause. Resulting from that failure the learned judge had fallen into error in holding that because there was no claim prior to February 2003 then there was no breach of cl 2.02(2) on the part of the respondent.

[24] It was also patently plain and clear in evidence that the problems relating to the houses in the project were first reported in April 2000. Even if it can be said that the respondent was not aware of it in April 2000 itself, then at least he would have become aware when some residents reported on the structural defects on 9 August 2000 and extended a copy of their complaints to him. On top and above this, the respondent through PW1 admitted in

evidence, that he was indeed aware that there would be potential claims by the time he signed up the proposal form on 31 October 2000. In an answer to a cross-examination question, the respondent admitted that he was aware of the complaint on the structural defect. Not only that he admitted of the intimation of the potential claim against him, he had even agreed and admitted that he was then obliged under the term of the policy to disclose such information to the appellant but, he did not.

[25] The learned trial judge failed to appreciate this evidence and failed to address these admissions by the respondent in her judgment. The pure admissions made by the respondent that there was indeed a breach of cl 2.02 was too obvious to be ignored. On these admissions alone the learned judge could have easily found a breach of the policy by the respondent which entitled the appellant to rely on cl 2.02(2) to repudiate the policy.

[26] Learned counsel for the respondent did not address the requirement of cl 2.02 in his submissions either orally or in his written submission. A futile attempt was made orally before us to the effect that the respondent was not aware of the claim nor was there any claim made against him at the material time. This submission by learned counsel contradicted the clear admission made by the respondent in his testimony. We therefore were not able to appreciate this line of submission advanced by learned counsel. We hasten to add that counsel firstly, should not contradict the case of his client and secondly should always endeavour to assist the court in the conduct of these proceedings, instead.

[27] The learned judge having failed to construe the requirement of disclosure under cl 2.02(2), went on to fasten her decision by deliberating on the requirement of cl 3.03 instead. Clause 3.03 of the said policy clearly stipulates the following terms:

> 3.03 As a condition precedent to their rights under this Policy the Insured shall give to the company immediate notice in writing of:
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> (1) any claim made or notified against them; or
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> (2) knowledge of circumstances which may give rise to a claim against them; or
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> (3) the receipt of notice from or information as to any intention by another party to claim against them; or
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> (4) the discovery of reasonable cause to suspect any dishonest, fraudulent (whether actual or constructive) or malicious act(s) or omission(s) of any of their past or present employees or fellow partners or co-directors, whether giving rise to a claim or not and shall in all cases upon request give to the Company such information including where necessary a signed declaration as it may reasonably require to

investigate the circumstances and conduct the defence of a claim.

[28] As a condition precedent to the claim under the policy the respondent ought to comply with the requirement of giving notice in writing of any claim made against him. The learned judge had made her finding that the respondent had indeed complied with this clause when he notified the appellant of the impending claim vide the three letters of 1 March 2001, 20 April 2001 and 7 August 2001 and therefore there was a proper claim made. We agreed with Her Ladyship's deliberation on cl 3. In placing her whole reliance on the requirements of cl 3 the trial judge had not appreciated the stand taken by the appellant on the requirement of disclosure under 2.02(2) first. The issue on cl 3 did not even arise when cl 2.02(2) had been breached. The compliance of cl 3 by the respondent does not ipso facto made his claim valid.

[29] The learned judge had not only failed to construe the relevant clauses of the policy correctly but had failed to appreciate the requirement of a full and frank disclosure in an insurance contract. It is well settled that an insurance contract imposes a mutual duty on parties to it, to act *uberrimae fides* towards each other. This court had in *Leong Kum Whay v QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 MLJ 710; [2006] 1 CLJ 1 emphasised on that need. The insured must make a full and frank disclosure of all material facts within his knowledge and there is also a corresponding duty to act in utmost good faith on the part of the insurer (see *AXA Affin General Insurance Bhd v ALW Car Workshop Sdn Bhd* [2017] 2 MLJ 101; [2017] 2 CLJ 163 and *Tan Kang Hua v Safety Insurance Co* [1973] 1 MLJ 6 (FC)).

[30] The appellant further submitted that the learned High Court had further fallen into another error to find that there was no breach of the terms of the policy when the settlement agreement for the sum of RM730,000 was entered into by the respondent. The settlement agreement took place on 22 February 2011, after the appellant had already repudiated its liability under the policy on 21 May 2004. Prior to that the appellant through the same letter of 28 March 2003 had stated that the appellant was in the midst of perusing and investigating its liability, and had advised the respondent to proceed with the proper and appropriate action. There is no mention of any advice or consent for a settlement of the claim, in the letter.

[31] The learned judge had misconstrued this letter as amounting to consent to settle the claim against the respondent. But even if the letter would in any way tantamount to an implied consent, the learned judge had fallen into error to find no breach of the terms by the respondent in entering into the settlement agreement. This is because the consent required under cll 1.02 and 3.02 must be one in writing. Clauses 1.02 and 3.02 are clear and unambiguous that a written consent is required to embark on a settlement exercise.

[32] It is axiomatic that the duty of the court is to give effect to the bargain entered into between parties especially when the terms are spelled out in writing. When words are written in clear language there is very little that the court can do but to give effect to the plain meaning of the words (see *Perbadanan Kemajuan Negeri Selangor v Selangor Country Club Sdn Bhd* [2017] 2 MLJ 819; [2016] 8 CLJ 211 and *Juara Serata Sdn Bhd v Alpharich Sdn Bhd* [2015] 6 MLJ 773; [2015] 9 CLJ 37).

[33] We therefore could not appreciate the stand of the learned respondent's counsel that the letter of 28 March 3003 which requested the respondent to defend the case himself could be read to imply consent to a settlement. It was made, as it is clearly stated therein pending the appellant perusing through, on the aspect of its liability. It cannot be taken or construed as implied consent from its plain reading. In any event, the subject matter on the settlement of claim had been clearly addressed in the terms of the policy. Clauses 1.02 of the policy requires written consent of the appellant to enter into any settlement of a claim. In addition, cl 3.02 prohibits any admission of liability on the part of the insured to settle any claim or incur any costs or expenses in relation to a claim without written consent from the appellant as the insurer.

[34] We are mindful of the long established principle that an appellate court would only intervene with the decision of a trial court in the rarest occasion. The Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453 had set the rule that, generally an appellate court will only interfere on finding of facts on a plainly wrong test. A plainly wrong decision can happen when a trial judge is guilty of failure to appreciate or to sufficiently appreciate evidence at trial. In the same way errors of law, a clear misunderstanding of relevant evidence too contributes to such a plainly wrong decision (see *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428; [2016] 4 CLJ 665). On the reasons that we had elucidated above we are convinced that the decision of the learned trial judge was a plainly wrong decision that called for appellate intervention.

[35] In the result we allowed the appeal of the appellant with costs and the decision of the learned judge was thereby set aside.

Appellant's appeal allowed with costs; decision of learned High Court judge set aside.

Reported by Dzulqarnain Ab Fatar